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No. 84-1050

In The
Supreme Court of the United States
October Term, 1984

HAZEL MAE JOLLEY,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were petitioner's rights as guaranteed by the Fourth Amendment to the United States Constitution violated by the warrantless seizure and removal of the murder weapon from the home of petitioner?

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OPINIONS BELOW

This was a criminal proceeding brought by the State of North Carolina against the Petitioner arising from a bill of indictment charging Petitioner with the murder of her husband, John Preston Jolley, Sr. The case proceeded to trial upon the charge of second degree murder. From a verdict of guilty and a sentence of imprisonment for a term of ten (10) years, Petitioner appealed to the North Carolina Court of Appeals. The North Carolina

Court of Appeals reversed the conviction and remanded the case for a new trial. The majority opinion of that Court ruled that the trial judge erred in failing to suppress the murder weapon (a .22 caliber semi-automatic rifle) seized from Petitioner's home. Braswell, J., dissented. The opinion of the North Carolina Court of Appeals is reported at 68 N.C. App. 33, 314 S.E. 2d, 134 (1984). A copy of the opinion is set forth in Petitioner's Appendix B beginning at page B-1.

Pursuant to N.C.G.S. 7A-30[1], the Respondent, State of North Carolina, appealed the decision of the North Carolina Court of Appeals to the Supreme Court of North Carolina as a matter of right. The Supreme Court of North Carolina reversed the decision of the North Carolina Court of Appeals. The opinion of the North Carolina Supreme Court is reported at 312 N.C. 296, — S.E. 2d, — (1984). A copy of the opinion is set forth in Petitioner's Appendix A beginning at page A-1.

From the decision of the North Carolina Supreme Court, Petitioner has filed this Petition for Writ of Certiorari to the North Carolina Supreme Court.

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[1]N.C.G.S. 7A-30(2) provides for an appeal to the North Carolina Supreme Court as a matter of right from any decision of the North Carolina Court of Appeals in which there is a dissent.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States:

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, . . ."

STATEMENT OF THE CASE

Evidence for the State tended to show that on 28 December 1982 Petitioner shot and killed her husband, John Preston Jolley, at the Jolley residence on Oak Grove Road in Ellenboro. Mr. Jolley was shot numerous times with a .22 semi-automatic rifle. Immediately after shooting her husband, Petitioner dialed a telephone operator and asked that help be sent to the Jolley residence.

Members of a volunteer rescue squad and deputies from the Rutherford County Sheriff's Department responded to Petitioner's call for help. The rescue personnel

arrived first and began performing emergency cardiopulmonary resuscitation procedures on Mr. Jolley. Deputy Summers of the Sheriff's Department was the first law enforcement officer to arrive. He arrived about 3:00 P.M. and saw the rescue technicians working on the victim, who was lying on the floor in front of a couch in the den-kitchen area of the house. The den-kitchen area comprised one large room partially separated by a bar. Deputy Summers observed a .22 semi-automatic rifle leaning against a chair about six feet from the victim. He also observed Petitioner kneeling on the floor of the kitchen, sobbing. Officer Summers decided to escort Petitioner out of the house because he felt that it would help her emotionally to be away from her husband's body. He took her outside and placed her in the front seat of his patrol car. He then returned to the house as rescue personnel were carrying the victim out to an ambulance. After the emergency personnel had transported the victim away from the scene, Deputy Summers secured a rope and crime scene poster from the trunk of his car and roped off the residence as best as he could. About that time, Officer Bill Watts arrived and shortly after that Major Philbeck arrived. Deputy Summers had been there about ten or fifteen minutes when Major Philbeck arrived. Major Philbeck went into the house as Summers and Watts were advising Petitioner of her Miranda rights. Summers then went into the house and conferred briefly with Philbeck, after which Summers drove Petitioner to the Rutherford County Jail.

Major Philbeck testified that when he entered the house he observed a .22 caliber rifle lying in a chair next to a wall in the den. He also found some spent cartridges and shells in the house. Philbeck stayed at the Jolley residence for six hours. He examined only the kitchen and den area of the house. He did not make a search of other rooms in the house. He took the .22 caliber rifle and the cartridges and shells to the Rutherford County Jail. These items were introduced into evidence during Petitioner's trial.

Several witnesses for the State testified that they examined State's exhibit number one, the .22 rifle taken from the den of the Jolley home, and they found it to be in proper operating order. They found nothing which would have caused the weapon to discharge in an automatic fashion.

Petitioner's evidence tended to show that on 28 December 1982 her husband was resting on the sofa in their den when she decided to go shopping. She stated she intended to buy some bullets and took a rifle out of its gun rack in the den to see what kind of bullets it required. She testified that the rifle accidently discharged while she was attempting to remove a bullet from it. She testified further that the semi-automatic rifle malfunctioned when it accidently discharged and continued to fire in an automatic fashion. She testified that after the rifle discharged, she threw it behind her in the den and dialed the telephone operator for help. Petitioner also introduced evidence to the effect that multiple discharges are common in the kind of rifle in question.

Prior to trial, Petitioner filed a written motion to suppress the "rifle" and "any test results pertaining to

the gun". The basis for the motion was that its exclusion is required by the Constitution of the United States or the Constitution of North Carolina in that the seizure of the rifle resulted from an unlawful search and seizure. The trial judge denied the motion to suppress.

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REASONS WHY THE WRIT SHOULD BE DENIED

The North Carolina Supreme Court properly concluded that petitioner's rights under the Fourth Amendment were not violated by the warrantless seizure of the murder weapon from the petitioner's house.

The North Carolina Court of Appeals held that Philbeck had conducted a warrantless search not justified under either the consent to search or exigent circumstances exceptions to the warrant requirements of the Fourth Amendment. The Court concluded that the scene as Philbeck found it presented no exigent circumstances and Petitioner's call for help could not be viewed as consent to search by an officer (Philbeck) who was not involved in aiding the victim.

The North Carolina Supreme Court reversed holding that the Court of Appeals erred in failing to focus upon the key issue, to wit: At what point was the rifle in question seized within the meaning of the Fourth Amendment? The Supreme Court held that when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of crime, and secures the crime scene from persons other than law enforcement officers by appropri-

ate means, all property within the crime scene *in plain view which the officer has probable cause to associate with criminal activity* is thereby lawfully seized within the meaning of the Fourth Amendment. Officers arriving at the scene thereafter can examine and remove property *in plain view* without a search warrant.

There is a "seizure" of property when there is some meaningful interference with an individual's possessory interest in that property. *United States v. Jacobsen*, — U.S. —, 80 L. Ed. 2d 85 (1984). When a law enforcement officer secures a crime scene, he limits the ability of persons other than law enforcement officers to remove items from the secured area. Thus, such items are seized within the meaning of the Fourth Amendment.

Petitioner does not question the fact that Deputy Summers lawfully entered the Jolley residence. He responded to Petitioner's call for help and entered the premises reasonably believing that a person inside was in need of immediate aid. The Petitioner, emergency personnel and the victim were still in the house. The rifle in issue was observed by Summers in plain view six feet from the victim's body.

In *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L. Ed. 2d 290 (1978) this Court stated it was not questioning the right of police officers to respond to emergency situations. The Court further stated that the police may seize any evidence which is in plain view during the course of their legitimate activities. Under the ruling in *Mincey* it is clear that Deputy Summers could have seized the rifle in issue when he first entered the house. The State submits the right to seize this evidence was not lost simply

because Deputy Summers elected to do the humane thing and escort Petitioner out of the house because she was emotionally upset.

His action in roping off and posting the area as a crime scene constituted a seizure of the rifle. When Philbeck, who also responded to Petitioner's call for help arrived, Summers turned the crime scene over to him. When Summers re-entered the premises to explain the situation to Philbeck, he could have taken possession of the rifle. Instead, he left the rifle in place and a fellow officer transported it to the County jail.

Petitioner argues there was no probable cause to seize the rifle. In support of this argument she points out that when Philbeck arrived at the house, Summers told him he did not know if they were dealing with an accidental shooting or a homicide.

The State submits Deputy Summers had probable cause to associate the rifle with criminal activity. *Texas v. Brown,* 460 U.S. 730, 75 L. Ed. 2d 502 (1982). It was not necessary for Summers to know the rifle was evidence of a crime in order to comply with the "immediately apparent" requirement of *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). It is sufficient if the facts available to the officer would warrant a man of reasonable caution in the belief that the rifle may be useful as evidence of a crime. It does not demand any showing that such a belief is correct, or more likely true than false. "A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Texas v. Brown,* 460 U.S. 730, 742.

Major Philbeck's observation of the rifle in issue constitutes nothing more than a "second look" at an item in plain view already lawfully observed and seized by Deputy Summers. Once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost. *Illinois v. Andreas,* — U.S. —, 77 L. Ed. 2d 1003 (1983); *United States v. Jacobsen, supra.* See also *Katz v. United States,* 389 U.S. 347, 19 L. Ed. 2d 576 (1967); *Coolidge v. New Hampshire, supra.*

Major Philbeck also responded to Petitioner's call for help. Petitioner was still at the scene although the body had been removed and transported away. Philbeck's entry into the house was nothing more than a continuation of Summers' initial entry. *Michigan v. Tyler,* 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978).

When a police officer has observed an object in plain view the owner's remaining interests in the object are merely those of possession and ownership. Requiring police to obtain a warrant once they have obtained a first-hand perception of incriminating evidence generally would be a "needless inconvenience", *Texas v. Brown, supra.* It was lawful and proper for Philbeck to transport to the county jail the rifle which was in plain view and which had been lawfully seized by the securing of the crime scene by Deputy Summers.

The ruling of the North Carolina Supreme Court is in accord with the following post-*Mincey* cases in which this Court has denied certiorari: *State v. Anderson,* 42 Or. App. 29, 599 P. 2d 1225 (1979), *cert. denied,* 446 U.S. 920 (1980); *State v. Martin,* 274 N.W. 2d 893 (S.D.), *cert. denied,* 444 U.S. 883 (1979).

Petitioner relies primarily upon *Mincey* and *Thompson v. Louisana,* 53 U.S.L.W. 3396 (November 26, 1984) to support her argument that certiorari should be granted. Each of these cases is distinguishable from the case at bar.

In *Mincey* a gun battle erupted during an undercover drug buy at defendant's apartment. Undercover officers stormed the apartment to render aid to the wounded. The wounded were removed from the premises. Detectives, who were not involved in the undercover operation, arrived at the scene and began a general search of the entire premises which lasted four days. The search included the opening of drawers, closets, cupboards, the emptying of clothing, and the removal of carpets. Several hundred items of evidence were seized, including illegal drugs which were concealed in the apartment. No search warrant was obtained.

The Arizona Supreme Court upheld narcotic convictions against the defendant on the ground that the warrantless search was permissible as a part of a routine homicide investigation. This Court reversed holding there is no "murder scene exception" to the warrant requirements of the Fourth Amendment. The Court stated " . . . that the warrantless search of Mincey's apartment was not constitutionally permissible because a homicide had recently occurred there." 437 U.S. 385, 395.

In *Thompson* deputies went to the home of defendant pursuant to a homicide report from defendant's daughter. Upon their arrival at the scene, they were advised by defendant's daughter that defendant had shot her husband and then attempted suicide. The daughter let them in the house. The deputies found defendant's husband dead of

gunshot wounds in one bedroom and the defendant unconscious in another bedroom due to an apparent drug overdose. The deputies immediately transported the unconscious defendant to a hospital and secured the scene. About thirty-five minutes later two detectives from the homicide unit arrived and conducted what they described as a two hour "general exploratory search for evidence of a crime". During the search they examined each room in the house. They seized a pistol found inside a chest of drawers in the same room as deceased's body, a torn up note in a wastepaper basket in an adjoining room, and a letter (alleged to be a suicide note) found folded up inside an envelope containing a Christmas card on top of a chest of drawers.

A sharply divided Louisiana Supreme Court upheld the seizure of all the evidence. This Court, citing *Mincey*, reversed. In so doing, the Court stated:

> Petitioner's attempt to get medical assistance does not evidence a diminished exception of privacy on her part. *To be sure, this action would have justified the authorities in seizing evidence under the plain view doctrine while they were in petitioner's house to offer her assistance.* In addition, the same doctrine may justify seizure of evidence obtained in the limited 'victim-or-suspect' search discussed in Mincey. *However, the evidence at issue here was not discovered in plain view while the police were assisting petitioner to the hospital,* nor was it discovered during the 'victim-or-suspect' search that had been completed by the time the homicide investigators arrived. 53 U.S.L.W. 3396, 3397 (Emphasis added.)

In the case at bar, the rifle in issue was discovered in plain view while Deputy Summers was lawfully in Petitioner's house to render aid to the victim in response to

Petitioner's call for help. Philbeck also responded to the call for help. Petitioner was still present at the scene when he arrived, and she did not object to his entry into the house.

Petitioner argues that the rifle was inadmissible because Philbeck conducted a six hour search in the house. Although Philbeck remained in the house for six hours, it is clear from the record that the rifle was not discovered as the result of a "search" of Petitioner's premises. The rifle was in plain view. The only other items taken from the premises were spent cartridges and bullets. All of these items were discovered in the den where the shooting occurred. Philbeck's investigation was limited to the den-kitchen area of the house. He did not conduct a search of the entire house.

N.C.G.S. 15A-975 requires that a motion to suppress evidence on constitutional grounds be made prior to trial unless certain specified exceptions, not applicable to this case, apply. Petitioner's pre-trial motion to suppress was limited to the "rifle" and "test results" stemming from its examination. Even assuming for the sake of argument that some of the spent cartridges and bullets were not in plain view, Petitioner waived any right to object to the introduction of these items into evidence. Thus, both the North Carolina Court of Appeals and the North Carolina Supreme Court limited the scope of their respective decisions to the constitutionality of the seizure of the rifle from Petitioner's house. As the North Carolina Supreme Court noted, "We need not decide whether the additional items identified by Major Philbeck were competent as evidence, as defendant is not contesting their admission into evidence." 312 N.C. at 303.

Unlike *Mincey* and *Thompson* there was no general search of the entire premises. The discovery of the rifle in issue did not require a prying into hidden places for that which was concealed. It was in plain view in close proximity to the victim's body. Philbeck's observation of the rifle constituted nothing more than a "second look" at an item lawfully observed and seized by Deputy Summers. Philbeck did not discover the rifle as the result of a search: he merely transported an item already lawfully seized to the county jail.

As Judge Braswell stated in his dissenting opinion in the Court of Appeals decision: "The law enforcement officer's legal authority to be in the house should not be lost, like losing one's place in line, because the first officer to arrive had left the house to escort the defendant outside and because the officer [Philbeck] who arrived five minutes later [but pursuant to the original call for help] failed to beat the body out of the house to justify exigent circumstances." 68 N. C. App. at 39.

Petitioner stresses the fact that in *Thompson* the officers who responded to the call for help *secured the scene* before they transported the defendant to a hospital. Therefore, she argues the decision of the North Carolina Supreme Court in this case is contrary to the ruling of this Court in *Thompson*. This argument is without merit. In *Thompson* the officers who responded to the call for help did not observe any incriminating evidence in plain view while they were in the defendant's house to render aid. All of the incriminating evidence was concealed; it was revealed as the result of the warrantless search by officers who did not respond to the call for help.

The decision of the North Carolina Supreme Court is not in conflict with *Thompson*. The North Carolina Court simply holds that when an officer responds to a call for help and observes incriminating evidence in plain view while he is lawfully within the defendant's house to render aid, and he thereafter secures the crime scene, the officer's action in securing the crime scene constitutes a "seizure" by him of the evidence lawfully observed in plain view. An officer subsequently entering the crime scene can lawfully take possession of the seized evidence and transport it to the jail.

CONCLUSION

The decision of the North Carolina Supreme Court is not in conflict with the decisions of this Court in *Mincey* and *Thompson*. For the reasons stated herein it is respectfully submitted that Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

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